

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MUBAREZ S. AHMED,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 242183

Wayne Circuit Court

LC No. 01-003529-01

Before: Kelly, P.J. and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of second-degree murder, MCL 750.317, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to forty to sixty years for each murder conviction, and to two years for each felony-firearm conviction. We affirm.

I. Anonymous Tip

Defendant argues that the trial court abused its discretion in admitting a police officer's testimony about an anonymous tip and erred in failing to give a cautionary instruction. We find the trial court did not abuse its discretion in admitting the testimony, but it committed a nonreversible error in failing to give a cautionary instruction.

The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo." *Id.* Claims of instructional error are also reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The police officer testified about the anonymous tip as follows:

Q. Did you receive some information, an anonymous tip regarding a person who may have been involved in the shooting of Mr. Griffin and Ms. White?

A. Yes, I did.

Q. Did that information include a nickname?

A. Yes, it did, sir.

Q. Based on that information, did you obtain a photograph of [defendant]?

A. Yes, I did, sir.

Q. Did you compare the photograph with the description as given to you by Ms. Woods?

A. Yes, I did, sir.

Q. Based on that information, did you have [defendant] arrested?

A. Yes, I did, sir.

The trial court did not abuse its discretion in admitting this testimony. To begin with, the testimony was not hearsay because it was offered to show the sequence of events that led the police to the defendant; it was not offered for the truth of the matter asserted. MRE 801(c). The police officer's testimony was clearly limited in scope to showing how the police selected defendant as a suspect.

We find that although the evidence was admissible, the trial court should have given the jury a cautionary instruction. However, when a trial court fails to instruct the jury that evidence may only be considered for a limited purpose, admission of that evidence does not require reversal when the erroneous admission was not outcome determinative. Because a witness identified defendant as the shooter, the testimony regarding the tip was not outcome determinative. *People v McAllister*, 241 Mich App 466, 469-471; 616 NW2d 203 (2000). Therefore, the trial court's failure to give the cautionary jury instruction, even if erroneous, does not require reversal.

II. Jury Instructions

Defendant also argues that the trial court erred in denying his request to give defendant's proposed jury instruction on identification. We disagree.

"Jury instructions are to be read as a whole rather than extracted piecemeal to establish error." *Kurr, supra* at 327. "Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* "No error results from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction." *Id.* Because the trial court read the standard identification instruction, CJI2d 7.8, and the standard witness credibility instruction, CJI2d 3.6, we conclude that the instructions, as a whole, covered the substance of defendant's proposed identification instruction. See *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). The trial court did not err in refusing to read defendant's proposed identification instruction.

III. Prosecutorial Misconduct

Defendant also argues that the prosecutor's remarks during rebuttal argument constitute prosecutorial misconduct. We disagree.

"Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* at 272-273. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Schutte, supra* at 721.

Defendant first argues that the prosecutor improperly made disparaging remarks about defense counsel. "A prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence." *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Based on our review of the prosecutor's entire rebuttal argument, we conclude that the remark defendant complains of was no more than a response to defense counsel's closing argument and did not deny defendant a fair trial.

Defendant also argues that the prosecutor improperly vouched for a witness' credibility. "[T]he prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Defense counsel attacked the witness' credibility during his closing argument. In rebuttal, the prosecutor remarked that the witness was a good witness who did not equivocate or seem unsure. The prosecutor's comments did not suggest that he had some special knowledge about the witness' truthfulness. Because these comments were responsive to defense counsel's attack on Woods' credibility, they were not improper. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Even if the prosecutor's remarks were improper, the trial court's instructions on witness credibility, CJI2d 3.6, and that arguments of attorneys are not evidence were sufficient to cure any prejudice. *Bahoda, supra* at 281; *Abraham, supra* at 276.

IV. Motion to Exclude Photographs

Defendant also argues that the trial court erred in denying defendant's motion to exclude the photographs of the victim's body. We disagree.

Photographs are admissible if they are relevant under MRE 401 and their probative value is not substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

The photographs were essential in proving that the victim had no weapons and was in a relaxed state, which goes to defendant's intent. Having decided that the photographs are relevant under MRE 401, it is then necessary to evaluate their probative value under MRE 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. Like the photographs in *Mills*, the photographs here were accurate representations of the victim's body. They "did not present an enhanced or altered representation of the injuries." *Mills, supra* at 77. Thus, the probative force was not substantially outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting the photographs.

V. Motion to Suppress

Defendant also argues that the trial court erred when it denied defendant's motion to suppress the identification as the result of an unlawful arrest. We disagree.

A trial court's ruling on a motion to suppress evidence is reviewed with deference, and it will not be disturbed on appeal unless it is clearly erroneous. *People v Callon*, 256 Mich App 312, 321; 662 NW2d 501 (2003). "Clear error exists where the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* A trial court's conclusions of law are reviewed de novo. *Id.*

"A police officer may arrest an individual without a warrant if a felony has been committed and the officer has probable cause to believe that the individual committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998). "In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *Id.* at 631.

Here, the police were provided with a witness' description of the shooter and the type of vehicle he drove. The police also received an anonymous phone call identifying the shooter's nickname, "Spaghetti," and his ethnicity. The officer determined that defendant is "Spaghetti," and that defendant's girlfriend drove a car matching the description provided. The police officer then obtained a photograph of defendant and concluded that it was consistent with the description. Based on this information, defendant was arrested. The information was sufficient to "justify a fair-minded person of average intelligence in believing" that defendant committed the murders. *Id.* at 631. Thus, we find the police had probable cause to arrest defendant and the motion to suppress was properly denied.

VI. Cumulative Error

Defendant's final argument is that cumulative error denied defendant due process. "This Court review[s] a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial. The cumulative effect of several minor errors may warrant

reversal even where the individual errors in the case would not warrant reversal.” *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Because we conclude there was not more than one error, defendant’s cumulative error argument is without merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot